Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of	)	
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Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended;	)	
	)	
and	)	CC Docket No. 96-149
	)	
Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	

REPLY COMMENTS OF U S WEST, INC.

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COMMENTING PARTIES

Ameritech
Association for Local Telecommunications Services ("ALTS")
Association of Telemessaging Services International ("ATSI")
AT&T Corp. ("AT&T")
Bell Atlantic Telephone Companies and Bell Atlantic Communications, Inc. ("Bell Atlantic")
BellSouth Corporation ("BellSouth")
California Cable Television Association ("CCTA")
Commonwealth of the Northern Mariana Islands
Competitive Telecommunications Association ("CompTel")
Excel Telecommunications, Inc.
Florida Public Service Commission
Frontier Corporation ("Frontier")
Independent Data Communications Manufacturers Association ("IDCMA")
Information Industry Association ("IIA")
Information Technology Association of America ("ITAA")
MCI Telecommunications Corporation ("MCI")
MFS Communications Company, Inc. ("MFS")
Michigan Public Service Commission Staff
Missouri Public Service Commission
National Association of Regulatory Utility Commissioners ("NARUC")
National Cable Television Association, Inc. ("NCTA")
New Jersey Division of the Ratepayer Advocate
NYNEX Corporation ("NYNEX")
Pacific Telesis Group ("PacTel")
People of the State of California and the Public Utilities Commission of the State of California
Public Utilities Commission of Ohio
SBC Communications Inc. and Southwestern Bell Telephone Company ("SBC")
Sprint Corporation ("Sprint")
State of New York Department of Public Service
Telecommunications Industry Association ("TIA")
Telecommunications Resellers Association ("TRA")
Telefónica Larga Distancia De Puerto Rico, Inc. ("TLD")
Teleport Communications Group Inc. ("Teleport")
Time Warner Cable ("Time Warner")
United States Telephone Association ("USTA")
U S WEST, Inc.
Voice-Tel
WorldCom, Inc. d/b/a LDDS WorldCom ("LDDS")
Yellow Pages Publishers Association

SUMMARY

This docket seeks information on the types of structural safeguards that ought to be imposed on BOC separate subsidiaries which provide interLATA services. In these Reply Comments, U S WEST responds to various arguments of competitors which seek to arbitrarily restrict U S WEST'S ability to compete fairly and reasonably in the interLATA marketplace.

Perhaps the most consistent theme of those favoring imposition of severe restrictions on BOC competitive abilities in the interLATA market is their overwhelming opinion that Congress did not know what it was talking about when it passed the Telecommunications Act of 1996. Indeed, not only is the fundamental intent of Congress -- that both interLATA and intraLATA markets become more competitive -- ignored, but these commenting parties universally act as if the rules established by Congress (and, indeed, this Commission) to govern the interplay between a lawfully established Section 272 subsidiary and a BOC cannot possibly work. Similarly, these commentors all operate on the assumption that the interconnection principles enacted by Congress (as implemented by the Commission) were never even enacted, far less successfully (AT&T's constant assumption in its comments that it will continue to purchase interstate carrier access pursuant to interstate access tariffs for the indefinite future being a good example). In point of fact, under the 1996 Act and the rules promulgated thereunder, everything has changed, including all of the most fundamental assumptions about the nature of local exchange and exchange access service. The

persistent failure of commenting parties to even recognize, far less analyze, this essential reality makes their comments hit far from the mark.

For example, many commenting parties attack various lawful joint activities between BOCs and their Section 272 subsidiaries on the basis of the pre-Act analyses of cross subsidization and access discrimination. However, none of these parties even attempts to address the fact that cross subsidization under the Act would be an economically unreasonable and irrational course of action. With network elements priced at cost plus a reasonable profit (on a forward-looking basis) the concept of cross subsidization becomes an economically irrational act. Similarly, claims of access discrimination ring hollow in the teeth of the statutory language in the Act prohibiting such discrimination. U S WEST submits that it would take a cynicism beyond all bounds of reason to assume that BOCs would, in their operations, deliberately disobey the lawfully enacted laws of Congress. The safeguards of the statute are more than sufficient to protect against any conceivable type of discrimination -- certainly against any type of discrimination Congress thought worth protecting against. Efforts to preclude economically rational joint activities -- particularly in the areas of administrative support and corporate governance -- must be rejected.

In a similar vein, the Act specifically envisions that BOCs and their Section 272 affiliates will be able to joint market long distance and local exchange services -- subject to a variety of statutory conditions. Commenting parties spend vast amounts of time and ink arguing that such joint marketing should not be permitted

-- or at least should be so drastically circumscribed that joint marketing would be infeasible. The theory that joint marketing would be seriously pernicious, and Congress should not have permitted it in the first place is not credible based on a reading of the statute and the legislative history. In point of fact, we submit that there is no likelihood that any joint marketing -- even without the safeguards put in place by Congress -- would cause any perceptible competitive harm. But it is impossible to argue that joint marketing should be prohibited by rule -- because Congress has already made the decision that joint marketing is an acceptable -- actually a salutary -- activity for BOCs and their Section 272 subsidiaries.

Similar arguments seeking to unduly regulate the Section 272 subsidiary must be rejected. Clearly under the Act and under common principles of administrative law, a Section 272 subsidiary is not a dominant carrier, and is not a BOC or an incumbent LEC (unless it becomes a BOC or an incumbent LEC under the successor or assign provisions of the Act).

Before the
FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area	)	CC Docket No. 96-149

REPLY COMMENTS OF U S WEST, INC.

U S WEST, Inc. ("U S WEST") hereby submits its reply comments in the above-captioned docket.[1]

I. INTRODUCTION

Interconnection has failed.

Barely a week after the Federal Communications Commission ("Commission") adopted comprehensive rules[2] to implement the interconnection

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[1] In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended; and Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, CC Docket No. 96-149, Notice of Proposed Rulemaking, FCC 96-308, rel. July 18, 1996 ("Notice").

[2] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 96-98, 95-185, First Report and Order, FCC 96-325, rel. Aug. 8, 1996 ("First Interconnection Order"); In the Matters of Implementation of the Local Competition Provisions of

requirements of the Telecommunications Act of 1996,[3] all those who wish not to compete with the Bell Operating Companies ("BOC") have pronounced interconnection a failure. It will not -- cannot -- introduce competition into the local exchange sufficient to overcome the BOCs' supposed ability to cross subsidize their competitive long-distance and manufacturing operations and otherwise to behave anti-competitively.

The solution? Rewrite the Act to incorporate the additional restrictions Congress intended to impose on the BOCs' separate affiliates, but somehow overlooked or inadvertently rejected. Then, decide that the separate affiliates -- with a combined market share of zero -- will be "dominant" when one "non-dominant" provider controls well over half the market. Without these steps, the BOCs will have unfair advantages in providing interLATA services and in manufacturing telecommunications equipment, because nothing has changed.

But everything has changed. The Commission knows it.[4] The trade press knows it.[5] The BOCs certainly know it. Only the BOCs' opponents choose to ignore

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the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Area Code Relief Plan for Dallas and Houston, Ordered by the Public Utility Commission of Texas; Administration of the North American Numbering Plan; Proposed 708 Relief Plan and 630 Numbering Plan Area Code by Ameritech-Illinois, CC Docket Nos. 96-98, 95-185, 92-237, NSD File No. 96-8 and IAD File No. 94-102, Second Report and Order and Memorandum Opinion and Order, FCC 96-333, rel. Aug. 8, 1996 ("Second Interconnection Order") (collectively "Interconnection Orders" or "Orders").

[3] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act" or "Act").

[4] "This order is the most pro-competitive action of government since the break-up of the Standard Oil Trust." Separate Statement of Chairman Reed E. Hundt, First Interconnection Order.

the profound change wrought by the 1996 Act and most especially by the Interconnection Orders. These opponents are trapped in 1984,[6] and they attempt to advance their agenda -- exclusion of the BOCs from the interLATA and manufacturing markets -- by means of an Orwellian view of the industry, complete with examples of "newspeak."

The Commission must not fall into this time warp. Its decisions in this docket must reflect the impacts of the 1996 Act and the Interconnection Orders. And in light of those impacts, nothing additional is needed: the BOCs simply do not have the ability to advantage their separate affiliates by means of cross subsidization or discrimination.

As explained below, the regulatory regime imposed by the First Interconnection Order eliminates the possibility that a BOC could misallocate the costs of its interLATA or manufacturing separate affiliate and have any hope of recovering them from "monopoly" ratepayers. The Commission thus must view very skeptically any proposed restriction on a separate affiliate that is advanced as protection against cross subsidy. Unless the proponent can specifically show how -- in light of the First Interconnection Order -- a BOC could cross subsidize its

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[5] *Telecommunications Reports* tagged its August 12, 1996 edition, which reported the Commission's Interconnection Orders, the "End-of-the-World-as-We-Know-It Issue."

[6] Sprint relies heavily on the 1984 GTE Consent Decree to justify restrictions that will be imposed on the BOCs and their separate affiliates no sooner than 1997. Sprint at 20-22. Teleport argues "the very theory of divestiture" -- another 1984 event -- to support its view that separate affiliates should not be allowed to provide exchange service. Teleport at 10.

separate affiliate without the proposed restriction, the Commission should reject it. The tired litany of the past can no longer justify shackling the BOCs.

The 1996 Act imposes detailed separation and nondiscrimination requirements on a BOC's dealings with its separate affiliate. If any of those requirements require interpretation, the Commission should provide that.[7] But to impose significant additional requirements, simply because a competitor claims a BOC might discriminate, is to say that Congress did not know what it was doing when it drafted the Act. But we must presume that Congress did know what it was doing, at least until experience demonstrates the need for additional requirements.

Congress plainly did not intend for the Commission to fashion comprehensive rules to implement Section 272. We know this because when Congress expected that of the Commission, it said so.[8] Congress did not do that in Section 272, strongly suggesting it believed the Act, by itself, was enough. Thus, although the Commission certainly retains its general rulemaking authority, it should tread lightly here; unless a proposed rule is well supported by a showing that it is both necessary and consistent with the aims of the Act, the Commission should reject it. Such analysis will lead the Commission to reject virtually every rule proposed in this docket.

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[7] For Example, defining what "goods, services, facilities and information" are subject to the nondiscrimination obligations of Section 272(c)(1).

[8] See, e.g., 1996 Act, 110 Stat. at 63, 106-107 §§ 251(d)(1), 276(b)(1).

II. THE COMMISSION SHOULD SPECIFICALLY REJECT ANY PROPOSED RESTRICTION OSTENSIBLY AIMED AT PREVENTING CROSS SUBSIDIZATION (¶¶ 55-64)

In the First Interconnection Order, the Commission imposed specific rules on the pricing of interconnection between an incumbent local exchange carrier ("LEC") and an unaffiliated entity.[9] The rules prescribe that network elements are to be priced on the basis of forward-looking costs, the "total element long run incremental cost" or TELRIC.

Under the TELRIC methodology, the price of an element is determined by calculating the forward-looking cost of providing the LEC's total output of the element, assuming the most efficient technology available, and a reasonable allocation of forward-looking common costs.[10] The total cost of providing an element is divided by projected demand, including the BOC's own use of the element, to arrive at a unit price.[11] The elements priced in this manner will effectively include the LEC's entire local network.[12] The LEC has the burden of proving, by means of a

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[9] First Interconnection Order, Appendix B, 47 CFR § 51.501, et seq.

[10] Id. § 51.505.

[11] Id. § 51.511.

[12] "A 'network element' is a facility or equipment used in the provision of a telecommunications service. Such term also includes, but is not limited to, features, functions, and capabilities that are provided by means of such facility or equipment, including, but not limited to, subscriber numbers, databases, signaling systems, and information sufficient for billing and collection or used in the transmission, routing, or other provision of a telecommunications service." Id. § 51.5. See also id. § 51.505(c)(2)(B), which requires that "[t]he sum of the allocation of forward-looking common costs for all elements and services shall equal the total forward-looking common costs, exclusive of retail costs, attributable to operating the incumbent LEC's total network, so as to provide all the elements and services offered."

cost study meeting the Commission's methodology, that its element prices do not exceed the forward-looking cost per unit of providing that element.[13] Although the rules allow element rates to include an appropriate allocation of forward-looking common costs, the Commission anticipates those costs to be minimal.[14]

This regime eliminates any opportunity the BOCs might have had to misallocate common costs from its competitive endeavors to "monopoly" services. Such a misallocation presumes an embedded cost methodology, in which costs are incurred, incorporated into a "rate base," and then spread among a variety of finished services, on the assumption that historical costs reflect future costs. The Commission's interconnection pricing takes a completely different approach. It essentially requires an incumbent LEC to develop the prices of interconnection elements from the "ground up;" only the costs actually related to the provision of the particular element may be included in its TELRIC. An allocation of common costs is added to the TELRIC, but they are forward-looking common costs, and they must exclude any costs related to retail services. Indeed, for our purposes here, perhaps the most important point to all this is that the costs used to price interconnection elements will not necessarily be the costs actually incurred by the incumbent LEC in providing those elements. The costs used for pricing are the costs incurred by a hypothetical LEC using the most efficient available technology. The LEC can recover its actual costs only by being as efficient as that hypothetical LEC.

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[13] Id. § 51.505(e).

[14] Id. ¶ 678.

In this pricing regime, the BOCs will have no place to "hide" any costs they might misallocate from their separate affiliates. More important, they would have no hope of recouping those costs: again, that an incumbent LEC has incurred a cost has no direct bearing on what it may charge for an interconnection element. And if a BOC cannot recover the misallocated costs, cost misallocation becomes an irrational strategy that can only reduce the overall earnings of the firm.[15]

The BOCs will, of course, provide more than interconnection elements; they will also provide retail services and wholesale versions of those services. The retail services will be subject to competition from resellers, from entities providing service by means of network elements, and from facilities-based competitors. Any additional costs padded onto a BOC's retail prices will simply hasten its competitive losses. Moreover, the BOCs' retail services remain subject to regulation; the prices for the interconnection elements will provide regulators with a benchmark to determine the reasonableness of retail prices.

Wholesale prices provide even less room to "hide" misallocated costs. The Commission's resale pricing rules[16] dictate that wholesale prices are to be determined by removing from the retail prices the costs recorded in specific accounts relating to the provision of retail services. The LEC may include a portion of the costs in certain other accounts only to the extent it can demonstrate that

[15] Unless, of course, the BOC can drive all the interexchange carriers ("IXC") from the field and thus create a monopoly on all interLATA traffic. There is no chance of that.

[16] First Interconnection Order, Appendix B, 47 CFR § 51.601, et seq.

those costs are incurred in providing wholesale service.[17] Wholesale pricing will be regulated by the state commissions, and the incumbent LEC's competitor-customers can be expected to review its cost studies and challenge them vigorously, attempting to remove more retail costs to lower the LEC's wholesale prices.[18]

In these circumstances, cross subsidization becomes virtually impossible and always irrational. U S WEST thus believes the Commission should reject any restriction ostensibly aimed at preventing cross subsidization unless the proponent can demonstrate specifically how a BOC has subsidized or could subsidize its separate affiliate absent the proposed restriction. No restriction proposed in this docket -- including those suggested in the Notice -- is supported by that sort of analysis.

The proposed restrictions that must thus be rejected include virtually everything the commentors believe to be "required" by Section 272(b)(1).[19] The Notice tentatively concluded that this provision, which requires a separate affiliate to "operate independently" from the BOC, intends to impose additional restrictions beyond those spelled out in the balance of Section 272(b), and it invited comments on what that might mean.[20] The flood of suggestions -- most of them different from one another -- demonstrates rather clearly that Section 272(b)(1) does not intend

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[17] Id. § 51.609.

[18] As the "spread" between an incumbent LEC's wholesale and retail prices increases, so does the profit potential of its competitors.

[19] 1996 Act, 110 Stat. at 92 § 272(b)(1).

[20] Notice ¶ 59.

any specific restrictions. As we noted in our comments,[21] Congress intended to empower and encourage the Commission to adopt additional rules when it found them necessary to a separate affiliate's independent operation. The key, though, is necessity, and that must include an assessment of the harms to competition that will be prevented by implementing the rule. Absent that, the rule cannot be necessary. Independent operation is not intrinsically beneficial; it is a means to an end, and if a proposed rule does not advance that end, the Commission should not adopt it.

None of the proposals in the comments comes close to meeting this standard. CompTel, for example, proposes that the Commission require the adoption of the "Ameritech Customers First Plan."[22] Why? To "substantially minimize the BOCs' ability to violate the independent operation requirement."[23] The argument thus comes full circle: independent operation has become the end, whatever its effect on competition. We find the same circularity in AT&T's proposal to impose the Computer II rules, all of which "are necessary elements of . . . operational independence."[24] The separate affiliates must have greater operational independence to ensure that they have greater operational independence. And so on.[25]

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[21] U S WEST Comments at 29-31.

[22] CompTel at 14-17.

[23] Id. at 16.

[24] AT&T at 22-23.

[25] TIA claims that operational independence requires separate facilities, citing H.R. 1555, 104th Cong., 1st Sess., § 246 (1995), which would have expressly prohibited the joint ownership and shared use of property other than telecommunications

The game here is to define "operate independently" to suit the commentor's particular wishes, and then to propose rules "necessary" to fulfill that definition. Thus AT&T tells us that Sections 272(b)(2)-(5) "do not come close to establishing the operational independence" required by Section 272(b)(1).[26] That is, the Act fails to impose the operational independence required by the Act. Therefore, says AT&T, the Commission must interpret this provision to prohibit joint planning between a BOC and its separate affiliate, and to prohibit the separate affiliate's owning or building its own exchange facilities and its using the BOC's network elements to provide local service. These requirements are essential (even though Congress apparently never considered putting them in the Act).[27] And why are they essential? To ensure independent operation.[28] The house of cards collapses under the weight of analysis.

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facilities. TIA at 22 n.47. That Congress considered -- and then rejected -- such a prohibition suggests rather strongly that it did not intend it. The suggestion becomes conclusive when we consider that Congress did incorporate such a prohibition as to an electronic publishing separated affiliate (1996 Act, 110 Stat. at 101 § 274(b)(5)(B)). If independent operation -- which Section 274 also requires -- implicitly precludes joint ownership, Congress would not have needed an express prohibition in Section 274.

[26] AT&T at 20.

[27] The House bill included a prohibition on joint ownership of facilities and property. H.R. 1555, § 246(c)(4), (5). Not even that provision made its way into the Act.

[28] AT&T at 20-22. In fact, Congress intended to "ensure that the [BOC] long distance subsidiaries have the ability to offer local service in the same manner as the interexchange carriers and other competitors." Letter, Rep. Michael Oxley to Craig Glaser, Chairman, PUC of Ohio, July 30, 1996. AT&T warns that if a separate affiliate is allowed to own its own facilities, the BOC will place all the new technologies in that network, to the detriment of its own network, leaving it "unimproved and atrophied." For a BOC to undertake to "starve" its principal asset would be economically irrational. More important, if a BOC has the wherewithal to construct an "overlay" network, AT&T -- with vastly greater resources than any

The answer, as we noted in our comments,[29] is that Congress defined "operate independently" in the balance of Section 272(b).[30] If the Commission finds additional safeguards necessary to protect competition (and not some abstract notion of operational independence), Congress directs the Commission to adopt them.

The Notice tentatively concluded that Section 272(b)(3), which requires only that a separate affiliate have separate officers, directors and employees, prohibits the sharing of certain support and administrative services.[31] Predictably, the BOCs' competitors have enthusiastically climbed on this band wagon.[32] None of them, however, attempts to support the proposal by showing that it would reasonably protect competition in some respect. To the extent any of them attempt to justify such a restriction, it is as a safeguard against cross subsidization,[33] or simply that Section 272(b)(3) requires it.[34] We demonstrated in our comments that Section 272(b)(3) does not require the Commission to make this determination and that it would conflict with the notion -- plainly contemplated by the Act -- that a BOC

BOC -- can surely do the same. And, if a BOC can implement a new technology outside the network (e.g., in a "platform" connected to the network, but not integrated into it), so can its competitors. Under any scenario, competition is not harmed.

[29] U S WEST Comments at 29.

[30] 1996 Act, 110 Stat. at 92-93 § 272(b), et seq.

[31] Notice ¶ 62.

[32] See, e.g., AT&T at 24-26; MCI at 27-28; CompTel at 18-20.

[33] AT&T at 25.

[34] See, e.g., CompTel at 18-19.

subsidiary can be a separate affiliate.[35] Nothing in the comments refutes that showing or otherwise provides a legitimate justification for this proposed restriction.[36]

The same holds true with respect to the comments regarding Section 272(b)(4), which prohibits a separate affiliate from obtaining credit under an arrangement that would allow a creditor to have recourse to the BOC's assets. As the Notice observed, this provision intends to protect BOC ratepayers,[37] and any rules the Commission might adopt to implement it must reflect that purpose. That disposes of CompTel's suggestion that the Commission "prohibit BOCs from becoming involved in the affiliate's financial matters altogether."[38] Such a rule is not necessary to protect ratepayers, and it would leave a BOC unable to manage a separate affiliate subsidiary, as it is required to do under the corporation laws.

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[35] U S WEST Comments at 22-25.

[36] That is also true of AT&T's proposal to prohibit the BOCs from basing the compensation of their officers on the performance of the separate affiliate, and vice versa. AT&T at 26. The only evil cited by AT&T is that such a compensation scheme would give the officers "financial incentives to work to promote the interests of both the BOC and its affiliate at the expense of their competitors." But "promot[ing] the interest" of the overall firm is what we generally think of as competition, just what the Act intends to foster. Moreover, all BOC officers and employees will have an interest in the success of the total business, regardless of their specific compensation scheme. Indeed, if the separate affiliate is a BOC subsidiary, the BOC's officers have a fiduciary obligation to the BOC's shareholders to "promote the interests" of the affiliate. Congress obviously knew that when it wrote the 1996 Act.

[37] Notice ¶ 63. Contrary to AT&T's assertion, nothing in the Act or its legislative history suggests that this provision was designed to prevent cross subsidization. AT&T at 26.

[38] CompTel at 18.

III. THE NONDISCRIMINATION RULES PROPOSED IN THE COMMENTS ARE UNNECESSARY AND WOULD SERVE ONLY TO HINDER THE ABILITY OF THE SEPARATE AFFILIATES TO COMPETE (¶¶ 65-89)

We noted above that in light of the detailed nondiscrimination requirements in the 1996 Act, the Commission should avoid imposing additional rules unless the proponents can make a clear showing of necessity and demonstrate that the proposal is consistent with the Act. That would dispose of nearly all the proposed discrimination rules in this docket. Those rules' proponents simply have not shown why, before any separate affiliate is up and running, the Commission needs to tinker with the carefully balanced scheme devised by Congress. They would simply disadvantage the BOCs or their separate affiliates.

Several parties have commented on the notion that technical equality may still be discriminatory.[39] Predictably, the BOCs' competitors claim that a BOC has a near-absolute duty to provide functional equality as between its separate affiliate and an unaffiliated entity. We can all conjure situations in which that is unquestionably correct. A BOC could not, for example, design a network interface that allows its separate affiliate to utilize the BOC's exchange network more efficiently than its competitors, and then deny that interface to those competitors, or give the separate affiliate a head start in the use of that interface. No additional rules are required to reach that result.

But if a competitor is less efficient (in the sense of needing to use less cost-effective exchange services and facilities, or more of them) by its own choice, the

[39] See, e.g., AT&T at 30-31; MCI at 36-37.

BOC should not be required to provide functional equality. To do so would discriminate not only against the separate affiliate, but against all other more-efficient competitors as well. It would also be anti-competitive, depriving the separate affiliate and its customers of the efficiencies available from the separate affiliate's innovation. In short, functional equality should be required only when the separate affiliate's advantage is not reasonably available to its competitors due to the actions of the BOC.

Section 272(c)(1) prohibits a BOC from discriminating between its separate affiliate and other entities in the area of standards. Although it gives no specifics, AT&T claims that attempts to ensure BOC impartiality in standards-setting bodies "have been less than fully successful" -- whatever that might mean.[40] Not knowing what specific problems AT&T has in mind, we cannot propose specific solutions. However, the answer is surely not, as AT&T suggests, to have the Commission insert itself into the process. Almost inevitably, standards would wind up being set by the Commission, rather than through industry consensus. We would do better to use the industry's standards-development activities. But these can be effective only if all affected industry members -- including the IXCs -- participate. If any participant abuses the process, the Commission's complaint procedures are always available to address the problem.

AT&T argues that Section 272(c)(1) prohibits a BOC from providing Customer Proprietary Network Information ("CPNI") to its separate affiliate unless

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[40] AT&T at 35.

it provides that information to the separate affiliate's competitors as well.[41] As we noted in our comments,[42] however, such a requirement would put the BOC in violation of Section 222.[43] If a customer directs the BOC to provide CPNI to the BOC's separate affiliate, Section 222(c)(2) requires the BOC to fulfill that request.[44] If the BOC also provides the CPNI to other carriers absent customer direction to do so, it would violate Section 222(c)(1) because it would be using the information for a purpose other than providing service to the customer.[45] The Commission can resolve this by determining that Section 222 is the exclusive provision dealing with CPNI; Section 272 does not apply.

AT&T proposes two interpretations of Section 272(e) that would require the BOCs to discriminate against their separate affiliates. Thus, AT&T argues that Section 272(e)(1) requires that the minimum response time a BOC provides to its separate affiliate for any service request must become the maximum response time for the requests of the affiliate's competitors.[46] In other words, AT&T would have the Commission require a BOC to meet every competitors' request as fast as or faster than it meets every request of its separate affiliate. Such a rule would require a BOC either to meet every request in an identical time -- which is

[41] Id. at 34.
[42] U S WEST Comments at 38-39.
[43] 1996 Act, 110 Stat. at 148 § 222.
[44] Id. § 222(c)(2).
[45] Id. § 222(c)(1).
[46] AT&T at 36-37.

impossible -- or to ensure that it always serves its separate affiliate more slowly than it serves the affiliate's competitors. The Act cannot intend so absurd a result.

In implementing Section 272(e)(1), the Commission must rely on some set of reasonable averages and reporting requirements. This provision surely prohibits a BOC from engaging in the behavior suggested by AT&T (responding faster to the time-sensitive service requests of its separate affiliate, and more slowly to the similar requests of its competitors). If a BOC engages in that behavior, the Commission can resolve the matter through a complaint proceeding. Unless and until we have specific evidence of that sort of thing, however, adopting AT&T's requested interpretation would be the grossest sort of overkill.

AT&T is equally off base in the area of pricing. It would have the Commission require that a BOC charge its separate affiliate "the highest unit price that any interexchange carrier pays for a like exchange or exchange access service."[47] This is needed, we are told, because the BOCs might design and implement discounted pricing schemes that benefit only their separate affiliates.[48] Presumably this means that the affiliate should pay the single unit price for a service even in a substantial volume is purchased. This approach would clearly be anti-competitive. Once again, the cure is all out of proportion to the problem -- if, indeed, there is a problem. But there likely is no problem. This sort of pricing would not be possible with respect to interconnection elements, the prices of which

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[47] Id. at 40.
[48] Id.

must reflect forward-looking costs, and the Commission has pledged to "reform" access charges next year to bring them closer to their costs. That will likely preclude the BOCs from adopting the sorts of pricing schemes alluded to by AT&T.

Finally, AT&T proposes to have the Commission rewrite Section 272(e)(4), which states that a BOC "may provide any interLATA or intraLATA facilities or services to its interLATA affiliate" if it provides those same facilities or services to all carriers on the same terms and conditions.[49] Despite this absolute language, AT&T argues that Section 272(e)(4) does not mean what it says: "any interLATA . . . facilities or services" actually means "only those interLATA services for which §272(a) does not require a separate affiliate."[50] But what then is the purpose of this provision? To permit the BOCs to provide to their separate affiliates what Section 272(a) already allows them to provide to anyone else? Surely not. AT&T's proposal "would render Section [272(e)(4)] surplusage [and] must be rejected."[51]

In Section 272(e)(4), Congress made a conscious choice to allow each BOC to be a "carrier's carrier" for its interLATA separate affiliate, so long as it provided the same services and facilities to other interLATA providers.[52] That decision doubtless reflects a determination that the bare provision of interLATA transport and facilities to another carrier, which will provide the actual end-user service, poses no threat to competition. To be sure, AT&T complains that a literal reading of Section

[49] 1996 Act, 110 Stat. at 94 § 272(e)(4) (emphasis added). And see AT&T at 41-47.
[50] AT&T at 41-42.
[51] See id. at 19.
[52] 1996 Act, 110 Stat. at 94 § 272(e)(4).

272(e)(4) will allow the BOCs "to cross-subsidize long distance service and engage in discrimination against facilities-based long distance carriers[.]"[53] But we are not told just how the BOCs will do this, in light of the equality requirement, and it is not at all obvious. Indeed, the most likely impact of a proper interpretation will be to lessen the reliance of non-facilities-based IXCs on AT&T for their transport.[54]

IV. THE PROPOSED INTERPRETATIONS OF THE JOINT MARKETING PROVISIONS WOULD READ THOSE PROVISIONS OUT OF THE ACT (¶¶ 90-93)

Once a BOC has received Commission authorization to provide in-region, interLATA service, Section 272(g)(2) allows it to market and sell its separate affiliate's in-region, interLATA service. This provision addresses only a BOC's actions with respect to the in-region services of its separate affiliate; it does not address at all what a BOC may or may not do with respect to services provided by unaffiliated IXCs. Hence, the Commission must reject out of hand MCI's suggestion that Section 272(g)(2) prohibits a BOC from "teaming" with an unaffiliated IXC.[55]

[53] AT&T at 42-43.

[54] AT&T claims that the interplay of Section 271(f), which "sunsets" all of Section 272 except subsection (e), and Sections 272(e)(2) and (4), which, by their terms, apply only to dealings between a BOC and a separate affiliate, means that a BOC must continue to provide interLATA services in a separate affiliate, even though the separation requirements of Section 272 (except for subsection (e)) no longer apply to that affiliate. AT&T at 30 n.29. Of all the possible interpretations of these provisions, this is surely the least likely. The better interpretation is that these two provisions continue to apply to a separate affiliate if the BOC chooses to maintain its interLATA business in such an affiliate, or that they apply to the BOC's interLATA operation, even after it has been integrated into the BOC.

[55] MCI at 47.